IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

SILVESTRE B. CUEVAS,

Petitioner,

v. **Civil Action No. 1:07cv164**
(Judge Keeley)

JOE DRIVER, Warden,

Respondent.

OPINION AND REPORT AND RECOMMENDATION

I. Procedural History

The *pro se* petitioner initiated this case on November 27, 2007, by filing a habeas corpus complaint pursuant to 28 U.S.C. § 2241. In the complaint, the petitioner asserts that the respondent has been deliberately indifferent to the petitioner's safety and has failed to take the proper and necessary measures to ensure his protection.

On January 3, 2008, the respondent filed a Motion to Dismiss. In support of his motion, the respondent asserts that the plaintiff has not properly filed a § 2241 claim and therefore his complaint should be dismissed. A Roseboro notice was issued the following day.

This case is before the undersigned for a Report and Recommendation on the respondent's Motion to Dismiss.

A. The Complaint

On November 27, 2007, the petitioner, a federal inmate incarcerated at United States Penitentiary ("USP") Hazelton, filed this *pro se* complaint under 28 U.S.C. § 2241. In his

complaint, the plaintiff alleges that the administration at USP Hazelton was deliberately indifferent to his safety and failed to take the necessary measures to ensure his protection. Because of the alleged indifference, petitioner prays for a "blanket separation" from all fellow inmates at USP Hazelton, in addition to any further institution to which he may be transferred.

According to his petition, petitioner asserts that he has been placed in protective custody at USP Hazelton because of his continuing cooperation with the government. Because of his cooperation with the government, petitioner asserts that his safety has been threatened by fellow inmates. Under the circumstances, the petitioner claims that the blanket separation is required by the penitentiary's policies. Although the petitioner has requested a blanket separation from his fellow inmates, USP Hazelton's administration has refused to grant the practice. Additionally, petitioner has exhausted his administrative remedies.

B. The Response

In his motion, the respondent asserts that the petitioner has improperly invoked habeas corpus procedures. Respondent asserts that the petitioner's claims center on the conditions of his confinement (i.e., his safety) and not on the duration of his sentence. Respondent asserts that under habeas corpus doctrine, petitioner can not challenge the conditions of his confinement. Because the petitioner asserts claims regarding the conditions of his confinement, respondent asserts that the petitioner should have filed a civil rights complaint instead of a habeas corpus petition. Therefore, respondent requests that the petition be dismissed.

III. Standard of Review

A. Motion to Dismiss

In ruling on a motion to dismiss under Rule 12(b)(6), the Court must accept as true all well-pleaded material factual allegations. Advanced Health-Care Services, Inc., v. Radford Community Hosp.,910 F.2d 139, 143 (4th Cir. 1990). Moreover, dismissal for failure to state a claim is properly granted where, assuming the facts alleged in the complaint to be true, and construing the allegations in the light most favorable to the plaintiff, it is clear as a matter of law that no relief could be granted under any set of facts that could be proved consistent with the allegations of the complaint. Conley v Gibson, 355 U.S. 41, 45-46 (1957).

When a motion to dismiss pursuant to Rule 12(b)(6) is accompanied by affidavits, exhibits and other documents to be considered by the Court, the motion will be construed as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

B. Motion for Summary Judgment

Under the Federal Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying the standard for summary judgment, the Court must review all the evidence "in the light most favorable to the nonmoving party." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The Court must avoid weighing the evidence or determining the truth or limit its inquiry solely to a determination of whether genuine issues of triable fact exist. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In Celotex, the Supreme Court held that the moving party bears the initial burden of

informing the Court of the basis for the motion and of establishing the nonexistence of genuine issues of fact. Celotex at 323. Once "the moving party has carried its burden under Rule 56, the opponent must do more than simply show that there is some metaphysical doubt as to material facts." Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmoving party must present specific facts showing the existence of a genuine issue at trial. Id. This means that the "party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of [the] pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." Anderson at 256. The "mere existence of a scintilla of evidence" favoring the non-moving party will not prevent the entry of summary judgment. Id. at 248. Summary judgment is proper only "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Matsushita at 587 (citation omitted).

IV. Analysis

The function of the writ of habeas corpus is to test in a court of law the legality of a person's detention or restraints on his liberty. As Chief Justice Marshall poetically waxed, "the writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause." See Ex parte Watkins, 28 U.S. 193 (1830); See also Eagles v. United States, 329 U.S. 304 (1946); Chin Low v. United States, 208 U.S. 8 (1908); Wales v. Whitney, 114 U.S. 564 (1885). In more recent cases, the Court stated the function of a writ in the modern practice of law:

> The writ of habeas corpus is a procedural device for subjecting executive, judicial, or private restraints on liberty to judicial scrutiny. Where it is available, it assures among other things that a prisoner may require his jailer to justify the detention under the law . . . this high purpose has made the writ the symbol and guardian of individual liberty.

See Peyton v. Rowe, 391 U.S. 54, 58 (1968). Despite the evolutionary nature of the writ, the United

States Supreme Court has viewed the traditional function of writs of habeas corpus as securing individual's release from illegal custody. Preiser v. Rodriguez, 411 U.S. 475, 484 (1973).

In contrast, a civil rights action has been construed as the appropriate mechanism for prisoners to contest the *condition of their confinement*, but not the fact or duration of their confinement. See Wilkinson v. Dotson, 544 U.S. 74, 82 (2005) (emphasis added). Accordingly, for a prisoner attacking the fact or duration of his imprisonment and thus seeking release, the United States Supreme Court has stated that a writ of habeas corpus is the only remedy. See Preiser, 411 U.S. at 499-500; see also Heck v. Humphrey, 512 U.S. 477, 481-82 (1994) (affirming the Court's holding in Preiser). Hence, as the Fourth Circuit has gone on to note, in determining whether a claim is cognizable under a civil rights action or under a writ of habeas corpus, a court must review whether the challenge is to the fact or duration of the prisoner's confinement, or to the conditions of the prisoner's confinement. Todd v. Baskerville, 712 F.2d 70, 73 (4th Cir. 1983).

In examining both doctrines, the Fourth Circuit has stated that a potential claim cannot be brought under both categories. Lee v. Winton, 717 F.2d 888 (4th Cir. 1983). In Lee, the petitioner, a state prisoner, brought both a civil rights complaint and habeas action to preclude the state from surgically removing a bullet from his chest. In determining if the claim should be brought under only the habeas action or both actions, the Fourth Circuit noted that Lee's claim was mostly "seeking to enjoin persons acting under color of state law from depriving a citizen of the United States of a right secured by the Constitution, a claim properly treated as one grounded exclusively in § 1983." Id. Further, the Fourth Circuit recognized a distinction between the two remedies:

> . . . the main thrusts of the two (remedies) are obviously quite different. [Habeas corpus] is primarily a vehicle for attack by a confined person on the legality of his custody and the traditional remedial scope of the writ has been to secure absolute release-either immediate or conditional-

> from that custody . . . . Conversely, § 1983 cannot be used to seek release from illegal physical confinement.

Id. Hence, the Fourth Circuit denied Lee's habeas petition.

In the present case, the indisputable facts of the record show that the petitioner's complaint focuses on the condition of his confinement. Petitioner complaint laments about his inability to receive blanket protection from his fellow inmates. See Petition (dckt. 1) pp. 4-5. However, in no section of his complaint does the petitioner attack the legality of his confinement. Instead, petitioner only attacks a condition, or lack of a perceived required condition, of his confinement. Hence, because he attacks a condition of his confinement, and not the legality of his confinement, petitioner has failed to state an adequate habeas basis for habeas relief.

Further, petitioner does not pray for a termination of his confinement, which is the proper remedy for a habeas petition. See Lee, 717 F.2d at 892. To the contrary, petitioner only asks for the perceived required blanket separation to be enforced and not a complete release from his sentence. Id. Thus, the petitioner has not sought the proper remedy under a habeas petition. Hence, the petitioner has incorrectly stated a habeas cause of action. Therefore, petitioner's claims should be dismissed.

V. Recommendation

Based on the foregoing, the undersigned recommends that the respondent's Motion to Dismiss (dckt. 7) be **GRANTED** and the petitioner's § 2241 petition be **DENIED** and **dismissed without prejudice.**

Within ten (10) days after being served with a copy of this Opinion/Report and Recommendation, any party may file with the Clerk of the Court, written objections identifying the

portions of the Recommendation to which objections are made, and the basis for such objections. A copy of such objections should also be submitted to the Honorable Irene M. Keeley, United States District Judge. Failure to timely file objections to the Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984);

The Clerk is directed to send a copy of this Opinion/Report and Recommendation to the *pro se* petitioner by certified mail, return receipt requested, to his last known address as shown on the docket, and to counsel of record via electronic means.

DATED: July 1, 2008.

John S. Kaull
JOHN S. KAULL
UNITED STATES MAGISTRATE JUDGE